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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	FCC 94-100
)	
Implementation of Sections 3(n))	
and 332 of the Communications Act)	GN Docket No. 93-252
)	
Regulatory Treatment of)	
Mobile Services)	
To: The Commission		

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OFFICE OF SECRETARY

COMMENTS OF THE RURAL CELLULAR ASSOCIATION

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SUMMARY

The RCA is an association comprised of small cellular operators that are affiliated with rural telephone companies who provide cellular service to rural America. RCA member companies currently use 25 MHz of spectrum to provide cellular service to their subscribers within geographic areas defined by the Commission as Rural Service Areas ("RSAs") and Metropolitan Statistical Areas ("MSAs").

The proposed spectrum cap, if adopted, will unnecessarily inhibit the provision of radio-based telecommunications services to rural America. Furthermore, placing a spectrum cap on rural telephone companies with cellular interests would violate the congressional directive set forth in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") which requires the FCC to adopt rules that ensure that spectrum is awarded in a manner that promotes the provision of service to rural America and the participation by rural telephone companies in the provision of that service.

In order to best serve the public interest, including those living in rural America, the RCA respectfully requests that the spectrum cap not apply to cellular and other CMRS licensees affiliated with rural telephone companies.

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COMMENTS OF THE RURAL CELLULAR ASSOCIATION

The Rural Cellular Association ("RCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, submits the following comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding released by the Federal Communications Commission ("FCC" or "Commission") on May 20, 1994.

I. STATEMENT OF INTEREST

The RCA is an association comprised of small cellular operators providing service to rural America. RCA's members serve over eighty licensed areas across the country covering approximately 6.5 million in population. The majority of the area served by RCA member companies is rural in nature. RCA member companies are affiliated with rural telephone companies.¹

¹ Section 1.2110(b)(3) of the Commission's rules currently defines a rural telephone company as an independently owned and operated local exchange carrier with 50,000 access lines or fewer,

In its FNPRM, the Commission proposes to limit the amount of spectrum Commercial Mobile Radio Service ("CMRS") providers can acquire within the same geographic area. The Commission tentatively concluded that the cap should be 40 MHz. FNPRM at para. 93. RCA member companies currently use 25 MHz of spectrum to provide cellular service to their subscribers within geographic areas defined by the Commission as Rural Service Areas ("RSAs") and Metropolitan Statistical Areas ("MSAs").² The proposed spectrum cap, if adopted, will unnecessarily inhibit the provision of radio-based telecommunications services to rural America.

Additionally, placing a spectrum cap on rural telephone companies with cellular interests would violate the congressional directive set forth in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") which requires the FCC to adopt rules that ensure that spectrum is awarded in a manner that promotes the

and serving communities with 10,000 or fewer inhabitants. In its Petition for Reconsideration filed on June 3, 1994 in response to the Commission's "Second Report and Order" in Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, 59 Fed. Reg. 22,980 (1994) ("Second R&O"), the RCA requested that the FCC modify this definition by changing the conjunctive "and" to the disjunctive "or." The RCA argued that if the definition is changed to allow companies to qualify as a rural telephone company based on either the number of access lines they serve or the population of each of the communities served, more rural telephone companies would be eligible for bidding preferences, thereby increasing the chance that new-radio based services will be licensed to entities that will provide the service to rural areas. Moreover, when viewed from an historical perspective, defining rural telephone companies more broadly will increase the likelihood of new, innovative radio-based technology coming to rural America.

² See 47 C.F.R. 22.2.

provision of service to rural America and the participation by rural telephone companies in the provision of that service. The adoption of such a cap would, by limiting the amount of spectrum which could be held by rural telephone companies, not only limit such companies' participation in the provision of new services, but, because such companies are the only entities which traditionally have provided service to rural America, would also prevent residents and businesses located in rural America from obtaining the benefits of new service offerings such as Personal Communications Services ("PCS").

The Commission specifically sought comment on the applicability of its proposed spectrum cap to rural telephone companies. See FNPRM at para. 103. Accordingly, the RCA will restrict its comments to the affect of a spectrum cap on rural telephone companies.

II. BACKGROUND

Historically, rural telephone companies have been the only providers of telecommunications services in rural areas. Larger companies have chosen not to provide telephone service to these less economically desirable areas. The commitment these telephone companies have made to provide their subscribers with new telecommunications services is readily demonstrated by their quick roll-out of cellular services in the rural markets and the recent construction of radio-based wireless cable systems to provide video services to rural America.

The FCC and Congress have also recognized the commitment of rural telephone companies to serving the needs of rural subscribers and have afforded rural telephone companies appropriate treatment in recognition of this commitment. In 1984, Congress created a "rural exemption" to its telephone cable cross-ownership prohibition in order to ensure that cable service was made available to rural America.³ More recently, Congress specifically mandated that the Commission award licenses for new technologies in a manner that promotes the following objectives:

- 1) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; and
- 2) the promotion of accessibility of new technology to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

See Budget Act, Section 309(j)(3).

III. DISCUSSION

The Commission is concerned that its recent allocation of PCS spectrum coupled with the reclassification of common carrier mobile radio services and a large segment of private radio mobile services as CMRS will allow entities with the ability to aggregate large amounts of CMRS spectrum in a given area to acquire excessive market power by reducing the number of competing providers not only

³ 47 U. S. C. § 533 (b)(3) (1993).

within specific service categories but CMRS generally.⁴ The Commission seeks comment on whether a spectrum cap would curb the ability of entities to obtain excessive market power. If it determines that spectrum caps are warranted, the Commission seeks comment on, inter alia, 1) what the CMRS spectrum limit should be; 2) whether all CMRS spectrum should be included; 3) the percentage of ownership interest that should be attributable; 4) the amount of geographic overlap that must occur between the designated geographic area and a CMRS before a spectrum cap is triggered; and 5) whether members of the congressionally mandated designated entity group which includes rural telephone companies should be treated differently. RCA addresses each of these issues below.

A. A 40 MHz Broadband CMRS Spectrum Cap Should Not Be Applied to Rural Telephone Companies

The RCA believes that in light of the trend toward auctioning all future CMRS spectrum and the fact that auctions favor "deep pocket" telecommunications players, CMRS spectrum will inevitably be concentrated in the hands of a few. Even disregarding the auction issue, the recent trend toward consolidation among large telecommunications players (e.g., McCaw/AT&T; MCI/Nextel; and Bell Atlantic/TCI) indicates that CMRS licenses could be concentrated among a few large companies. While imposition of a CMRS spectrum cap, if properly implemented, could ensure that licenses are disseminated "among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by

⁴ See FNPRM para. 89.

minorities and women" in accordance with the congressional mandate, the RCA cautions the Commission to adopt rules with enough flexibility to ensure that rural telephone companies and other members of the designated preference group are not prohibited from obtaining spectrum. This issue is of particular importance to rural telephone companies who traditionally have been the only providers of telecommunications services in rural America and who rely heavily on the provision of radio-based services rather than wire and fiber to provide telecommunications services to these sparsely populated rural areas. The prohibitive costs of utilizing wire or fiber to provide such services, which would be imposed on rural telephone companies by a spectrum cap, would effectively deprive these rural areas of essential radio based services. Accordingly, in order to best serve the public interest, including those living in rural America, the RCA respectfully requests that the spectrum cap not apply to cellular and other CMRS licensees affiliated with rural telephone companies.

Under the broadband PCS rules adopted on June 9, 1994⁵, broadband PCS licensees other than cellular entities in their own service areas are limited to 40 MHz of spectrum, while cellular licensees may combine their 25 MHz allocation with up to 15 MHz of PCS spectrum in their own service areas. Cellular ownership is attributable to an entity if the entity holds more than a 20 percent ownership in a cellular licensee that serves 10 percent or

⁵ "In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion & Order," General Docket No. 90-314 (released June 13, 1994).

more of the population in an overlapping geographic service.

On December 8, 1993, the RCA filed a Petition for Reconsideration of the Commission's "Second Report and Order" in Amendment of the Commission's Rules to Establish New Personal Communications Services 8 FCC Rcd 7700 (1993) ("PCS Order") urging the Commission to exempt rural telephone companies with cellular interests from the cellular ownership attribution rule since it has the effect of limiting the provision of PCS to rural America by preventing rural telephone companies from providing the service to their rural subscribers. In its Reconsideration Order released June 13, 1994, the Commission raised the cellular ownership attribution limits from 20 percent to 40 percent for members of the congressionally mandated designated preference group which includes rural telephone companies, small businesses, and businesses owned by minorities and women.

Raising the cellular ownership attribution level from 20 percent to 40 percent does not resolve the problem faced by rural telephone companies who have traditionally been and will, in all likelihood, continue to be the only providers of spectrum-based telecommunications services to rural America. Many rural telephone companies hold more than a 40 percent ownership interest in the cellular licenses within their rural cellular areas.⁶ Limiting

⁶ Although the RCA plans to file a petition for reconsideration of the Commission's decision in the PCS Order on this issue, because the two proceedings are inextricably tied together with respect to this issue, the RCA states, for the record in this proceeding that application of this rule to rural telephone companies is not necessary to protect the public from "undue market power." The rule ignores the fact that many rural telephone

rural telephone companies with cellular interests to an additional 15 MHz of all other CMRS spectrum would mean that many CMRS services could not be provided to rural America by the only likely provider of such services.

The RCA submits that the Commission's positive experience with the rapid and efficient provision of rural cellular radio service by rural telephone companies attests to the validity of awarding special consideration in the instant proceeding. To the extent that these ownership restrictions may produce any public interest benefit, any such benefit will be outweighed by the detriment which would result from the application of the restrictions to rural telephone companies. In light of the clear directive that new radio-based services be provided to rural America and that licenses be disseminated to rural telephone companies, a rule that renders rural telephone companies with attributable broadband CMRS interests ineligible to obtain more than 40 MHz of CMRS spectrum is insupportable. Entities which qualify as "rural telephone companies" should not be frustrated in their attempt to continue their commitment to bring new technologies to rural America simply because of their prior record of fulfillment of their commitment to rural America. The Commission's proposed CMRS spectrum cap, by limiting rural telephone company participation, would severely

companies would be disqualified from applying for some PCS spectrum simply because they hold non-controlling interests of over 40 percent in cellular licenses. With respect to rural telephone companies that hold controlling interests in cellular licenses, the application will unnecessarily limit the participation in PCS by committed rural service providers in contravention of the Congressional mandate.

limit the provision of CMRS services to rural America. The Commission should not deny residents and businesses located in rural America the benefits of new technologies merely by virtue of their location. Rural telephone companies should therefore not be subject to any CMRS spectrum cap.⁷

B. Any Spectrum Cap Adopted Should Be Limited To Broadband Spectrum.

Should the Commission elect to impose a CMRS spectrum cap on rural telephone companies, any cap adopted should be limited to broadband spectrum only. As discussed above, limiting the amount of CMRS spectrum which may be held by rural telephone companies will unduly restrict the availability of a diversity of service offerings to residents and businesses in rural America. The adverse impact of such a restriction on rural telephone companies and individuals and businesses residing in their service areas would be exacerbated by including narrowband spectrum in the CMRS spectrum subject to a cap. In order for rural telephone companies to provide innovative CMRS services such as PCS to rural America, many narrowband services currently provided by such companies, such as rural radio service, (including Basic Exchange Telecommunications Radio Service (BETRS)) and paging service, would have to be divested by rural telephone companies if narrowband spectrum were made part of a 40 MHz spectrum cap applicable to

⁷ With respect to entities other than rural telephone companies, RCA agrees with the Commission that a 40 MHz limit on broadband CMRS spectrum would be consistent with the FCC's PCS allocation rules.

rural telephone companies. Rural residents and businesses could thus be deprived of the benefits of these critical telecommunications services. In the case of rural radio and BETRS, forced divestiture as a result of a spectrum cap would be totally inconsistent with rural telephone companies' universal service obligations.

There is no public interest benefit to the inclusion of narrowband spectrum in a CMRS spectrum cap. Further, narrowband services do not compete with broadband voice services currently used by rural telephone companies to provide cellular service. The narrowband services provided by rural telephone companies are not "substantially similar" to the cellular service and PCS service which utilize, or potentially may utilize, the vast majority of such companies' licensed spectrum.⁸ Such services constitute discrete markets and as such do not justify the adoption of an overarching spectrum cap. Accordingly, there is no justification for including narrowband CMRS spectrum in the CMRS spectrum cap.

⁸ The RCA notes that rural telephone companies are currently prohibited from holding Specialized Mobile Radio licenses pursuant to Section 90.603(c) of the Commission's Rules. In its Second Report and Order in GN Docket No. 93-952, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, the FCC among other things, noted in a discussion on the provision of dispatch service by cellular carriers that it would seek comment in a further notice of proposed rule making "to examine [its] prohibition against the licensing of wireline telephone carriers in the SMR service." This statement coupled with the congressional mandate for uniform regulation of all commercial mobile services, is the clearest indication that wireline telephone company entry restrictions with regard to the SMR service can no longer be justified and will eventually be lifted by the Commission. Accordingly, even more broadband CMRS spectrum could potentially be available to rural telephone companies to provide service to rural America.

IV. CONCLUSION

Congress has explicitly defined the public interest as requiring special regard to and accommodation of the needs of rural America. It has recognized the desirability of fostering participation by rural telephone companies in the provision of new radio-based services, including PCS and other broadband spectrum. Recognition of the unique circumstances surrounding the provision of radio-based services provided to rural America by rural telephone companies will guide the Commission to a finding that a CMRS spectrum cap is not applicable to rural telephone companies. Such a finding is therefore not only consistent with the congressional mandate, but also will serve the public interest.

Respectfully submitted,

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